

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAVON LAMAR TORBERT, CDCR  
#P-96193 } Case No. 11CV2953 DMS (WMc)

Plaintiff,  
v.  
COUNTY OF SAN DIEGO;  
MADSEN; STORTON, BLACK;  
MIDECKE; OGSBERT; JOHN DOES,  
Defendants. } **REPORT AND  
RECOMMENDATION OF  
UNITED STATES MAGISTRATE  
JUDGE RE: DISMISSAL  
WITHOUT PREJUDICE OF  
DEFENDANT KEAYS UNDER  
RULE 4(m) OF THE FEDERAL  
RULES OF CIVIL PROCEDURE**

## I. INTRODUCTION

Javon Lamar Torbert (“Plaintiff”), a state prisoner currently incarcerated and proceeding *pro se*, filed a civil rights action pursuant to 42 U.S.C. § 1983 on December 19, 2011. All defendants in this action have appeared except for Dr. Christie Keays. A process receipt for Dr. Christie Keays (“Defendant”) was returned *unexecuted* on May 23, 2013 with no forwarding information available. [ECF No. 161.] During a telephonic status conference on the issue of service on June 7, 2013, Plaintiff *pro se* was advised by the Court that Defendant Keays was subject to *sua sponte* dismissal without prejudice from this action. *See Fed. R. Civ. P. 4(m).* [ECF No. 162.]

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1                   **II. FACTUAL BACKGROUND**

2                   Plaintiff alleges excessive force was used against him as a detainee in San  
3 Diego Central Jail on June 20, 2009, when the Defendant Sheriffs shot pepper balls  
4 at Plaintiff through a small opening in his cell door and one ball struck him in his  
5 prosthetic eye. After he fell to the floor, Plaintiff alleges the Defendant Sheriffs  
6 tasered him above the groin area. Shortly thereafter, he was taken to a searching area  
7 outside his cell, slammed to the floor and handcuffed such that the handcuffs cut off  
8 the circulation to his hands and feet. On August 14, 2009, Plaintiff alleges he  
9 underwent eye surgery as a result of the pepper ball that struck his eye. The next day,  
10 Plaintiff alleges he was further injured in San Diego County Jail when the medical  
11 staff removed his bandages. As a result, Plaintiff alleges he needed further corrective  
12 surgery on February 26, 2010. Plaintiff's complaint identified the medical staff  
13 involved as John Doe defendants to be named after discovery. Plaintiff seeks  
14 compensatory and punitive damages in an amount to be determined at trial. [ECF No.  
15 ]

16                   **III. PROCEDURAL HISTORY**

17                   1. On December 19, 2011, the *pro se* Plaintiff filed a verified complaint alleging  
18 Cruel and Unusual Punishment under 42 U.S.C. § 1983 against Defendants. [ECF No.  
19 1.]

20                   2. On March 26, 2012, Plaintiff moved for an extension to amend the pleadings  
21 via letter to the Court. [ECF No. 20.]

22                   3. On April 2, 2012, Plaintiff's motion was granted, extending the filing  
23 deadline for motions, amendments and pleadings to April 6, 2012. [ECF No. 21.]

24                   4. On April 6, 2012, Plaintiff moved for a second Extension of Time to File  
25 Motion for Leave to Amend. [ECF No. 26.]

26                   5. On April 17, 2012, the extension request was granted and Plaintiff was  
27 ordered to provide the names and addresses for any Doe Defendant no later than May  
28 30, 2012. [ECF No. 31.]

1       6. On July 3, 2012, Plaintiff moved for a third Extension of Time to Amend  
2 Complaint [ECF No. 74.]

3       7. On August 22, 2012, Plaintiff's motion to amend was granted adding K.  
4 Kamoss as a Doe Defendant substitution. [ECF No. 110.]

5       8. On November 6, 2012, Plaintiff filed a motion to amend the complaint to add  
6 Dr. Christie Keays as a Doe Defendant substitution. [ECF No. 140.]

7       9. On November 13, 2012, the Court granted Plaintiff's motion directing  
8 Defendant to provide Plaintiff with the last known contact information for Dr. Keays.  
9 [ECF No. 142].

10      10. On November 30, 2012, January 14, 2013, and February 14, 2013, the Court  
11 held telephonic status conferences regarding the status of service on Dr. Keays. [ECF  
12 Nos. 146, 149 and 151, respectively.]

13      11. On March 11, 2013, the Court issued an order directing the U.S. Marshal  
14 to assist Plaintiff with service of the complaint due to his difficulty achieving service  
15 on Dr. Keays. [ECF No. 153.]

16      12. On May 13, 2013, the Court held a telephonic status conference regarding  
17 service on Dr. Keays. [ECF No. 158.]

18      13. On May 23, 2013, a process receipt was returned *unexecuted* for Dr. Keays  
19 and no forwarding information was available. [ECF No. 161.]

20      14. June 7, 2013, the Court held a telephonic status conference regarding  
21 service and discussed the unexecuted return receipt for Dr. Keays. [ECF No. 162.]  
22 The Court also advised Plaintiff that Dr. Keays was subject to *sua sponte* dismissal.

23                  **IV. LEGAL STANDARD**

24      Federal Rule of Civil Procedure 4(m) states: "If a defendant is not served  
25 within 120 days after the complaint is filed, the court—on motion or on its own  
26 after notice to the plaintiff—must dismiss the action without prejudice against that  
27 defendant or order that service be made within a specified time. But if the plaintiff  
28 shows good cause for the failure, the court must extend the time for service for an

1 appropriate period. This subdivision (m) does not apply to service in a foreign  
2 country under Rule 4(f) or 4(j)(1)."

3 **V. DISCUSSION**

4 The *pro se* Plaintiff is currently incarcerated and is filing *in forma pauperis*.  
5 [No. 4]. Plaintiff's incarceration makes it difficult for him to gather information  
6 because of restrictions on time and computer access. The Court, however, granted  
7 Plaintiff an extension of more than six months to identify Dr. Keays and to serve  
8 her in a timely manner.

9 More than 120 days have passed since Plaintiff filed his initial complaint.  
10 Plaintiff was granted additional time by the Court to identify Dr. Keays and  
11 complete the necessary forms for the United States Marshal Service to serve  
12 process on Defendant. Defendant could not be located and Plaintiff has not made  
13 the Court aware of any current locations or addresses for Dr. Keays.

14 The Plaintiff has not shown good cause for an additional extension of the  
15 deadline to serve Dr. Keays as required under Fed. R. Civ. 4(m). **It is therefore**  
16 **RECOMMENDED** the Court dismiss Defendant Christie Keays **WITHOUT**  
17 **PREJUDICE** from the action for failure to be timely served.

18 **VI. RECOMMENDATION AND ORDER THEREON**

19 For the reasons discussed above, **IT IS HEREBY RECOMMENDED** that  
20 the Court issue an order **DISMISSING WITHOUT PREJUDICE** Defendant **Dr.**  
21 **Christie Keays** for Plaintiff's failure to timely serve this Defendant or show good  
22 cause for the failure to serve this Defendant under Fed. R. Civ. P. 4(m).

23 **IT IS ORDERED** that no later than **July 19, 2013**, any party to this action  
24 my file written objections with the Court and serve a copy on all parties. The  
25 document should be captioned "Objections to Report and recommendation."

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1       **IT IS FURTHER ORDERED** that any reply to the objections shall be filed  
2 with the Court and served on all parties no later than August 2, 2013. The parties  
3 are advised that failure to file objections within the specified time may waive the  
4 right to raise those objections on appeal of the Court's Order. *See Turner v.*  
5 *Duncan*, 158 F.3d 449, 455 (9<sup>th</sup> Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156  
6 (9<sup>th</sup> Cir. 1991).

## IT IS SO ORDERED.

DATED: June 28, 2013

William McCurine Jr.